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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 346

UNION BANK & TRUST COMPANY, Petitioner,

vs.

R. C. PHELPS, Individually and as Tax Collector of Montgomery County, Alabama, Respondent.

On Writ of Certiorari to the Supreme Court of the State of Alabama

BRIEF OF PETITIONER

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SUPREME COURT OF THE UNITED STATES

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No. 346

UNION BANK & TRUST COMPANY, Petitioner,

vs.

R. C. PHELPS, Individually and as Tax Collector of Montgomery County, Alabama, Respondent.

On Writ of Certiorari to the Supreme Court of the State of Alabama

BRIEF OF PETITIONER

THE OPINION OF THE COURT BELOW

The decision of the Supreme Court of the State of Alabama was by a divided Bench and was rendered on May 19, 1932. An application for rehearing was denied on June 16, 1932. The majority opinion appears in the printed record at page 39 and the dissenting opinion at page 41. The case has not been officially reported, but appears in 142 Southern Reporter 552. Petition for writ

of certiorari was duly filed within the time provided by law and the writ was granted on October 17, 1932.

STATEMENT OF THE CASE

The petitioner, a state bank organized under the laws of Alabama relating to banking institutions, was at all times herein referred to engaged in the business of banking in the City of Montgomery, Alabama. It brought this action at law in the Circuit Court of Montgomery County, Alabama, against R. C. Phelps, individually, and as tax collector of Montgomery County, Alabama, to recover from him Twenty-five Hundred Twenty-one and 69/100 Dollars ($2521.69), taxes and interest erroneously and illegally collected and exacted from petitioner and paid by it under protest, on account of an ad valorem tax assessment for State and County purposes against the shares of the capital stock of petitioner for the tax year beginning October 1, 1930, and ending September 30, 1931. The assessment was made as provided by Section 6 of the General Revenue Act of Alabama of 1923 (General Acts of Alabama of 1923, page 152, Section 6) (Appendix).

The action was in the form authorized in Alabama. *Ward v. First National Bank of Hartford*, 142 Sou. 93, not yet officially reported.

The basis of the action as set out in the special counts of the complaint (R. 1-20) was:

(1) The State of Alabama had, by statute adopted in 1927 (General Acts of Alabama of 1927, page 139, Section 25), exempted from ad valorem taxation, or had left untaxed, shares of certain corporations which during the years 1930, 1931 and 1932 engaged in actual and substan-

tial competition with petitioner. A copy of the statute is set out in full in the appendix, the exemption provisions being as follows:

> "Every share of any domestic corporation (except banks or banking associations and building and loan associations, and mortgage companies or corporations making loans on real estate or purchasing mortgages or mortgage notes on real estate and industrial loan companies or corporations), shall be assessed and taxes thereon collected in the county wherein such corporation has its home or chief office in the State, and shall be assessed at sixty per cent of its fair and reasonable market value to the person in whose name such shares stand on the books of the corporation and not to the corporation. * * * Provided, however, that the provisions of this act shall not apply to the shares of stock of domestic or foreign mortgage companies or corporations whose chief business is making loans on real estate, or purchasing mortgages and mortgage notes on real estate; nor shall this act apply to the shares of domestic or foreign industrial loan companies or corporations, it being hereby expressly enacted that all shares of stock of such domestic and foreign mortgage companies or corporations and domestic and foreign industrial loan companies or corporations, shall be exempted from assessment and the payment of ad valorem taxes."

The State of Alabama had also exempted from taxation all mortgages, together with the notes, debts and credits secured thereby, on real and personal property situated in the State, provided such mortgages had been filed for record and the privilege tax paid thereon (Code of Alabama of 1923, Section 3022) (Appendix). The privilege tax referred to was at the rate of fifteen cents

(15¢) per hundred dollars, or fraction thereof, of indebtedness secured by such mortgages (General Acts of Alabama of 1923, page 152, Section 4½).

By reason of the exemption of the shares of said corporations, and the exemption of said monied capital, both of which during the years 1930, 1931 and 1932 existed in substantial amounts in actual competition with petitioner, Section 6 of the Revenue Act of 1923 imposing a tax on shares of national and state banks was void and unconstitutional insofar as it applied to the shares of petitioner, because violative of the equality clause of the Fourteenth Amendment to the United States Constitution and of Section 217 of the Alabama Constitution, which provides that the property of private corporations, associations and individuals of the State shall forever be taxed at the same rate.

(2) Section 6 of the Revenue Act of 1923 was ineffective insofar as it attempted to tax shares of national banks located in Montgomery, Alabama, because other monied capital in the hands of individual citizens of the State coming into competition with such national banks within the meaning of Section 5219 Revised Statutes of the United States was expressly exempted from taxation or was untaxed. The Attorney General of Alabama had rendered an opinion to respondent that the shares of such national banks could not be taxed (R. 12-15) and no efforts or attempts were being made or were intended to be made to collect any tax on such shares, and said national banks were engaged in actual and substantial competition with petitioner. As the State had failed to levy any valid and legal tax on the shares of such national banks, Section 6 of said statute was ineffective, discriminative and void insofar as it attempted to tax the shares of petitioner,

because violative of Section 1 of the Fourteenth Amendment to the United States Constitution and of Section 217 of the Alabama Constitution.

(3) It had been judicially determined by the United States District Courts in Alabama that the shares of national banks located in certain cities in Alabama, viz., Dothan, Selma and Troy, Alabama, could not be legally taxed under Section 6 of the 1923 Statute, for the reason that monied capital in the hands of citizens of Alabama within the meaning of Section 5219 Revised Statutes of the United States in substantial and actual competition with the business of national banks located in said cities was untaxed or exempted from taxation. The failure of the State effectively to tax national bank shares and the failure to tax, or the exemption from taxation of, shares of other corporations competing with petitioner and the exemption from taxation, or failure to tax, monied capital in competition with petitioner rendered ineffective and void the tax assessed under Section 6 of the 1923 Act against the shares of petitioner, because the assessment and statute were violative of Section 1 of the Fourteenth Amendment to the Federal Constitution and also Section 217 of the Alabama Constitution.

Petitioner's complaint also contained two common counts. (R. 11) Under the Alabama practice, if petitioner was entitled to recover at all, it could recover under such counts, regardless of the sufficiency of the special counts.

Ward v. First National Bank of Hartford, supra.

The written protest filed by petitioner with respondent denied the validity of the assessment, or any part thereof, and also contained a denial of the right of the State and

the County to make the assessment, and asserted that the collection of the tax was erroneously and illegally made and exacted. (R. 16)

Both the Circuit Court and the Alabama Supreme Court apparently considered that the assessment was made under Section 6 of the 1923 Act. It was the position of petitioner that if there was any other statute under which the tax might have been claimed to have been levied, the tax and the assessment of same was illegal and void because of the exemption or failure to tax the shares of competing corporations which were in the same class as its shares, and because of the exemption from taxation, or the failure to tax, monied capital engaged in actual and substantial competition with petitioner.

Respondent, by way of answer, pled defenses (R. 22-23) which may be summarized as follows:

1. Not indebted in the form and manner alleged.

2. No appeal was taken from the assessment and, as no protest was made until the taxes were paid, the protest was too late.

3. That the arrangement of national and state banks in one section as appeared in Section 6 of the 1923 Act was not a classification for taxation purposes but only a method of assessment. Respondent admitted that shares of certain national banks, presumably competing with petitioner, escaped share taxation, but this was because of the limitations placed by Congress upon the State's power to tax national bank shares. The failure of the State effectively to tax national bank shares did not relieve the petitioner from liability for the tax on its shares.

4. The Legislature had the right to select its subjects

of taxation and to exempt such as it saw fit, and the exemption of shares of stock of the corporations named in the petitioner's complaint was not arbitrary but a legitimate prerogative of the State and did not violate any constitutional provision.

Upon the trial of the action all of the facts were agreed upon by the parties, and may be briefly summarized as follows:

Plaintiff, an Alabama corporation having its principal and only office in Montgomery, Alabama, was, at the times involved in the issues, engaged in a general commercial and savings bank business. It accepted deposits, made loans, with real and personal property as security, and loans without security, and purchased and dealt in municipal and other bonds and securities. (R. 28)

During the year 1930, and continuously thereafter, there were building and loan associations, mortgage corporations, industrial loan corporations, insurance companies and industrial banks located in Montgomery, Alabama, and elsewhere in the state, which loaned money and otherwise engaged in substantial and actual competition with petitioner, and with two national banks located in Montgomery, Alabama, the capital and shares of which other corporations were either wholly exempted from taxation or were taxed at a lesser rate than the shares of petitioner and the shares of the national banks, and during said time there were individuals, firms and partnerships who employed monied capital in the business of loaning money and otherwise engaging in substantial and actual competition with petitioner and with said national banks, and such monied capital was untaxed or taxed at a lesser

rate than the shares of petitioner and the shares of the national banks. (R. 31)

The national banks located in Montgomery, Alabama, were engaged in substantial and actual competition with petitioner. (R. 33) The Eighth, Ninth, Tenth and Eleventh paragraphs of the agreed statement of facts are as follows:

> "Eighth: In the State of Alabama during 1930, 1931 and 1932 to date, there were many hundreds of thousands of dollars of moneyed capital in substantial and actual competition with the business of both National Banks and State Banks located in the County of Montgomery and in the State of Alabama other than moneyed capital representing merely personal investments and not made in competition with such banking business, used and employed in the business of mortgage companies, industrial loan companies, investment security dealers and companies, building and loan associations, insurance companies and corporations, and individuals engaged in financial businesses, all of which loaned money on real and personal security and without security, some of which dealt in investment securities and otherwise used moneyed capital in substantial and actual competition with the business of both National Banks and State Banks, which moneyed capital is, and was during said period, taxed at a lesser rate in the sense of burden imposed, than the rate of taxation sought by Section 6 of the General Acts of 1923, page 152, to be exacted upon the shares of National Banks and the shares of State Banks located within the State of Alabama, or is, and was during said period, expressly untaxed or exempted wholly from taxation.
>
> "Ninth. During said years 1930, 1931 and 1932 to date, there were and are building and loan associa-

tions, industrial loan companies and corporations, and industrial banks which engaged in business in the City of Montgomery, Montgomery County, Alabama, and loaned money in substantial and actual competition with the National Banks located in said City and County of Montgomery and in substantial and actual competition with the plaintiff State Bank to the extent of hundreds of thousands of dollars, the shares of capital stock and capital of which were, during said period, exempted from the assessment and payment of ad valorem taxes and were left by the laws of Alabama entirely untaxed, or were taxed at a lesser rate, in the sense of burden imposed, than the said shares of plaintiff or the shares of National Banks. During said period there were likewise mortgage companies and corporations making loans on real estate in the City of Montgomery and County of Montgomery and purchasing mortgages and mortgage notes on real estate in said City and County to the extent of many thousands of dollars in substantial and actual competition with the businesses conducted by the National Banks located in the City of Montgomery, Montgomery County, Alabama, and the plaintiff bank, which were exempted by the laws of Alabama from any tax upon their shares of capital stock or capital or left by the laws of Alabama wholly untaxed for ad valorem tax purposes with respect to their shares of capital stock, or were taxed at a lesser rate, in the sense of burden imposed, than the said shares of plaintiff or the shares of National Banks. During said period, there were insurance companies organized under the laws of Alabama and doing business in said City of Montgomery, Alabama, lending money on mortgages and purchasing state, municipal and other bonds in substantially the same manner as state and national banks located in Alabama, to the extent of many thousands of dollars,

which were entitled to certain credits or exemptions in computation of the tax assessed upon their shares of capital stock or capital by the laws of the State of Alabama for ad valorem tax purposes, which credits or exemptions were not accorded under the laws of Alabama in computation of assessments on the shares of capital stock or capital of said National Banks and State Banks, including said shares of plaintiff bank. During the said period, in the conduct of plaintiff's business and in the conduct of the businesses of the National Banks located in said City and County and in lending money and purchasing notes, bonds, stocks and securities, plaintiff bank and said National Banks found in actual and substantial competition with them other individuals, persons, firms, associations and corporations engaged in like business or businesses and using moneyed capital therein to the extent of many thousands of dollars, which moneyed capital was not assessed or taxed for ad valorem taxes under the laws of Alabama and was either expressly exempted by said laws or left untaxed by said laws, or was taxed, at a lesser rate, in the sense of burden imposed, than the said shares of plaintiff or the shares of National Banks. During said period, a large amount of property of like character to that of the shares of capital stock and capital of plaintiff bank and said National Banks, in the form of money loaned, bills and notes discounted, securities bought and sold, by a large number of persons, firms and corporations engaged in like businesses to the businesses of said National Banks and State Banks, including plaintiff bank, to the extent of many thousands of dollars in actual and substantial competition with the business of said National Banks and plaintiff bank was not assessed for taxation but was exempted by the laws of Alabama from ad valorem taxation or left untaxed by said

laws, or was taxed at a lesser rate, in the sense of burden imposed, than the said shares of plaintiff or the shares of National Banks.

"Tenth. During the time herein mentioned there were located and doing business in said City and County of Montgomery two National Banks and in the State of Alabama many National Banks which carried on the businesses of receiving and accepting deposits from persons, firms, associations and corporations residing or located and doing business in said City and County and also in other cities and counties in the State of Alabama and elsewhere, making loans to persons, firms, associations and corporations residing or located and doing business in said City and County of Montgomery and also in other cities and counties in the State of Alabama and elsewhere on real estate and personal property security, and without security, and purchasing and dealing in and with real estate mortgages, bonds of the State of Alabama and of the United States and other States, and bonds and other obligations and securities of governmental subdivisions of said State of Alabama, the United States and other States, and of private corporations and others and engaged generally in the business of commercial and savings banks. The said businesses carried on by said National Banks were and are in substantial and actual competition with the businesses carried on and transacted by the plaintiff during the time herein mentioned.

"Eleventh. That many of the corporations hereinabove mentioned are corporations organized and existing under the laws of Alabama and that during the times herein mentioned thousands of the shares of the capital stocks of said Alabama corporations were held and owned by the shareholders thereof."

A copy of the opinion of the Attorney General holding

that these shares were not liable for ad valorem taxes was introduced (R. 12-15), and it was admitted no taxes had been collected on account of such shares during the tax year 1930-1931, and that no effort to collect same had been made, and that respondent did not intend to collect same (R. 34).

The decisions of the United States District Court in Alabama holding that the shares of national banks located in Dothan, Troy and Selma, Alabama, respectively, were not liable for ad valorem taxes had not been appealed from. The time had expired in two cases and no appeal was intended to be taken in any of the cases (R. 33).

Petitioner paid the taxes under duress and under protest and respondent had the amount so paid in his custody and possession (R. 15-20, 34).

On the trial in the Circuit Court judgment was rendered in favor of petitioner for the full amount sued for. (R. 27). Respondent perfected an appeal to the Supreme Court of Alabama, which Court on May 19, 1932, reversed the judgment of the lower court and remanded the cause (R. 38). The decision was by a divided Bench, four of the Associate Justices concurring, and the Chief Justice and two Associate Justices dissenting. The opinion and dissenting opinion appear in the record at pages 39 to 56. The case has not yet been officially reported, but is reported in 142 Southern Reporter 552.

Petitioner, on June 1st, 1932, within the time allowed, filed an application for rehearing (R. 38). The application for rehearing was disallowed on June 16, 1932, and the former judgment of reversal and remandment was changed to a judgment reversing the judgment of the Circuit Court and rendering judgment together with costs in favor of respondent (R. 38).

SPECIFICATION OF ERRORS

The final decision and judgment of the Supreme Court of Alabama is erroneous in the following respects:

(a) It denies the petitioner the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States, in that under the statutes of Alabama shares of stock of corporations engaged in substantial and actual competition with petitioner are exempted from taxation, or are untaxed.

(b) It denies the petitioner the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States, in that under the statutes of Alabama monied capital in substantial and actual competition with petitioner is untaxed or expressly exempted from taxation.

(c) It denies the petitioner the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States, in that the State of Alabama has failed to levy a valid and legal tax on the shares of national banks engaged in substantial and actual competition with petitioner.

(d) In holding that there was no illegal or wrongful discrimination, contrary to the Fourteenth Amendment to the Constitution of the United States, by the State of Alabama in taxing shares of petitioner and exempting from taxation or failing to tax shares of corporations engaged in substantial and actual competition with petitioner.

(e) In holding that the taxing statutes of Alabama make no illegal discrimination, contrary to the Fourteenth

Amendment to the Constitution of the United States, against petitioner.

(f) In holding that the State of Alabama could tax shares of petitioner and exempt from taxation or fail to tax shares of competing corporations and monied capital coming into competition with petitioner, contrary to the equality clause of the Fourteenth Amendment to the Constitution of the United States.

(g) In holding that the taxes collected and exacted by respondent from petitioner were not illegally and erroneously collected under the statutes of Alabama, contrary to the Fourteenth Amendment to the Constitution of the United States.

SUMMARY OF ARGUMENT

I.

The State of Alabama has classified as a single class for the purposes of ad valorem taxation the shares of state and national banks.

General Acts of Alabama of 1923, page 152, Section 6, appendix.

II.

By reason of the existence, during the year 1930 and thereafter, of untaxed monied capital and corporate shares in actual and substantial competition with the two national banks in Montgomery, Alabama, the tax levied by Alabama upon the shares of said national banks became invalid and ineffective as to their shares.

Opinion of the Attorney General of Alabama, dated January 29th, 1932, R. 12 to 15 inclusive;
Ward v. First National Bank of Hartford, 142 So. 93 (not yet officially reported);
Mercantile National Bank v. New York, 121 U. S. 138;
Merchants National Bank v. Richmond, 256 U. S. 635;
First National Bank v. Anderson, 269 U. S. 341;
First National Bank of Hartford v. Hartford, 273 U. S. 548;
Minnesota v. First National Bank of St. Paul, 273 U. S. 561;
Georgetown National Bank v. McFarland, 273 U. S. 568;
Iowa-Des Moines National Bank v. Bennett, 284 U. S. 239.

III.

The Fourteenth Amendment to the United States Constitution requires equal treatment with regard to ad valorem taxation of all property and taxpayers classified as a single class for taxation purposes.

Central State Bank v. Bennett, 284 U. S. 239;
Sioux City Bridge Company v. Dakota County, Nebraska, 260 U. S. 441;
Greene v. Louisville & Interurban R. R. Co., 244 U. S. 499;
Raymond v. Chicago Union Traction Company, 207 U. S. 20;
Cummings v. Merchants National Bank, 101 U. S. 153;
Cumberland Coal Company v. Board of Revision, 284 U. S. 23;
Sunday Lake Iron Company v. Wakefield Twp., 247 U. S. 350;
Munn v. Des Moines National Bank, 18 Fed. 2nd, 269;
Ashland County Bank et al. v. Village of Butternut, 241 N. W. 638 (not yet officially reported).

IV.

This Court is not bound by the construction placed by a state court upon state statutes or the operation and effect thereof as applied and enforced by the State where rights secured by the Federal Constitution are involved.

St. Louis S. W. R. Co. v. Arkansas ex rel. Norwood, 235 U. S. 350;
Spraigue v. Thompson, 118 U. S. 90;
Poindexter v. Greenhow, 114 U. S. 270;
Baldwin v. Franks, 120 U. S. 678;
United States v. Ju Toy, 198 U. S. 253.

V.

Shares of national and state banks are the same species of property for ad valorem taxation, and no discrimination can be made in favor of one and against the other.

See cases under III supra and also the following:
State Bank v. Board of Revenue, 91 Ala. 217;
Commercial State Bank v. Wilson, 53 South Dakota 82;
Central National Bank v. Sutherland, 113 Neb. 126;
State Bank v. Endres, 109 Neb. 753;
State v. Mady, 83 Montana 418;
Security Savings Bank v. Board of Review, 189 Iowa 463;
Ashland County Bank et al. v. Village of Butternut, 241 N. W. 638 (not yet officially reported—Wisconsin).

VI.

Untaxed property competitive with petitioner existing in the form of the shares of said Montgomery national banks and monied capital and shares of other corporations in actual and substantial competition with petitioner, the assessment, levy and forced collection by Alabama of an ad valorem tax upon the shares of petitioner denies to petitioner and its shareholders the equal protection of the law contrary to the Fourteenth Amendment to the United States Constitution.

See cases under III supra and also the following:
F. S. Royster Guano Company v. Virginia, 253 U. S. 412;
Louisville Gas & Electric Company v. Coleman, 277 U. S. 32;

Airway Electric Appliance Corporation v. Day, 266 U. S. 71;
Schlesinger v. Wisconsin, 270 U. S. 230;
Quaker City Cab Company v. Pennsylvania, 277 U. S. 389;
Southern Railway Company v. Greene, 216 U. S. 400.

ARGUMENT

I.

Ad Valorem Taxation in Alabama

The Alabama constitutional provisions and statutes material to the issues here involved are briefly summarized.

Section 211 of the Constitution of Alabama of 1901 is

> "All taxes levied on property in this state shall be assessed in exact proportion to the value of such property, but no tax shall be assessed upon any debt for rent or hire of real or personal property, while owned by the landlord or hirer during the current year of such rental or hire, if such real or personal property be assessed at its full value."

Section 217 of the Constitution of Alabama of 1901 is

> "The property of private corporations, associations, and individuals of this state shall forever be taxed at the same rate; provided, this section shall not apply to institutions devoted exclusively to religious, educational, or charitable purposes."

These sections appeared in substantially similar form in the preceding State Constitution back to 1875. Therefore, cases decided by the Supreme Court of Alabama prior to 1901 as well as the more recent cases can be consulted in determining the construction of these provisions.

In *Mayor of Mobile v. Stonewall Insurance Company*, 53 Ala. 570, the Alabama Supreme Court, in considering a tax levied by the City of Mobile imposing a higher rate on property of individuals than on corporate property, said:

"Invidious exemptions or discriminations, by which the property of an individual, or of a corporation, is relieved from bearing a just proportion of the common burden taxation is intended to discharge, are violative of the equality of right of the citizen, which is a fundamental principle of our institutions. * * * If property of a particular kind is subjected to taxation, and owned by a corporation, it must bear the rate of taxation imposed on individuals. While the constitution inhibits the exemption or discrimination in favor of corporations, it equally inhibits a discrimination against them. Equality in bearing a common burden, which is natural right and equity, is secured alike to the corporation and to the citizen."

In *Moog v. Randolph*, 77 Ala. 597, the Alabama Supreme Court, in considering the effect of these constitutional provisions, said:

"It is settled that the general purpose of these clauses is to establish an *ad-valorem* system of taxation, thus exacting a certain kind of uniformity in the rules of taxation, as applied to the property of all persons, whether private or artificial. Sections similar in phraseology and signification, are found in the constitutions of some of our sister States. Their object has been construed to be, to secure, as far as practicable, that equality in bearing the just burdens of government, which has become a distinguishing characteristic of the American States, and has been well denominated the corner-stone of Anglo-Saxon liberty. These clauses have never been construed to exact the taxation of all property, of every description, in the State, at precisely the same rate of taxation, without regard to its peculiar nature, uses, or other characteristics. Nor can they any more be interpreted to prohibit exemptions from taxation, or

such *classifications of property,* as are not purely arbitrary, capricious, or without the semblance of reason.—*Clark & Murrell v. Port of Mobile,* 67 Ala. 217; *Mayor of Mobile v. Stonewall Ins. Co.,* 53 Ala. 570; Cooley's Const. Lim. 515; Burroughs on Tax. pp. 65-69, sections 53, 54. As observed by Judge Cooley, 'It is difficult to conceive of an exemption law which selects single individuals or corporations, or single articles of property, and, taking them out of the class to which they belong, makes them the subject of capricious legislative favor. Such favoritism could make no pretense to equality; it would lack the semblance of legitimate tax legislation.' Cooley on Tax. 153, 183; *Howell v. Bristol,* 8 Bush, 493."

The same court, in considering these constitutional provisions in *Phoenix Carpet Company v. State,* 118 Ala. 143, stated:

"The two sections of the Constitution supposed to be violated, read as follows: '1. All taxes levied on property in this State shall be assessed in exact proportion to the value of such property: *provided, however,* the General Assembly may levy a poll tax, not to exceed one dollar and fifty cents on each poll, which shall be applied exclusively in aid of the public school fund in the county so paying the same.' 'Section 6. The property of private corporations, associations, and individuals of this State shall forever be taxed at the same rate; *provided,* this section shall not apply to institutions or corporations devoted exclusively to religious, educational, or charitable purposes.' These sections by their terms relate only to direct taxes on property—it is only such taxes which are levied and assessed; and as to such taxes, they place corporations on an equality with natural persons; there can be no discrimination between them."

In *State v. Birmingham Southern Railway Company,* 182 Ala. 475, it was stated with reference to the meaning of Section 211 of the Alabama Constitution:

> "The purpose and scope of this constitutional limitation upon the taxing power has been frequently considered by this court, and the substance of our decisions is that it was designed to secure uniformity and equality by the enforcement of an ad valorem system of taxation and to prohibit arbitrary or capricious modes of taxation without regard to value. —*Moog v. Randolph,* 77 Ala. 597, 602; *W. U. Tel. Co. v. State Board, etc.,* 80 Ala. 273, 275, 60 Am. Rep. 99; *Assessment Board v. A. C. R. R. Co.,* 59 Ala. 551; *Mayor of Mobile v. Stonewall Ins. Co.,* 53 Ala. 570. This does not mean that all property must be taxed. —*Moog v. Randolph,* supra; *State Bank v. Board of Revenue,* 91 Ala. 217, 223, 8 South. 852. Nor does it prohibit exemptions from taxation or such classifications of property as are not purely arbitrary, capricious, or without the semblance of reason.—*Moog v. Randolph,* supra. It does, however, prohibit the Legislature from prescribing or declaring an arbitrary or artificial value of the property of individuals or corporations, and assessing taxes on such valuation. —*Assessment Board v. A. C. R. R. Co.,* supra. It is perfectly clear that there is nothing expressed or implied in the language of this limitation which prohibits the Legislature from fixing as a basis for taxation any percentage of the actual value of property, whether greater or less than 100 per cent. thereof, provided only that such rule is applied without discrimination to all property of the same nature."

The effect of the decisions is that all subjects of property upon which the State levies an ad valorem tax must be taxed at the same rate and accorded equality of treat-

ment, that the Legislature may select the subjects of taxation and accordingly may exempt from taxation such classes of property as it may determine, provided that its classifications for such exemptions are not "arbitrary, capricious or without the semblance of reason."

Out of these rules has grown the structure of the Alabama ad valorem taxing statutes.

As early as 1876 (Code of Alabama 1876, Sections 359 et seq.), the Alabama practice with respect to ad valorem taxation was adopted of

1. Providing for a levy at a uniform rate on such property as was not specifically exempted;

2. Providing for certain specific exemptions from taxation by classifications;

3. Providing procedure for determination of assessed value for taxation, which procedure varied materially with respect to different types or classes of property to be taxed.

That this practice may be properly followed subject to the limitation that no arbitrary, capricious or unreasonable discriminations or distinctions be made is unquestionably the rule adopted and adhered to by the Alabama Supreme Court with respect to the applicable provisions of the State Constitution. Of course the limitations of the Fourteenth Amendment to the Federal Constitution must also be observed.

So since 1876 the Alabama Revenue Laws have been so framed as to substantially differentiate the bases of fixing assessed values of various types or classes of property for ad valorem taxation. For example,

(1) Real estate and tangible personal property generally is assessed at sixty per cent of its fair and reasonable market value on October 1 in each year;

(2) Stocks of goods, wares and merchandise are assessed at sixty per cent of the average amount on hand during the preceding year with a minimum dependent upon the capital actually employed in the merchant's business and this without regard to the amount on hand or value on October 1;

(3) Corporate shares are variously assessed

(a) Of state and national banks at sixty per cent of fair and reasonable market value October 1 in each year less deduction for real estate and furniture and fixtures owned,

(b) Of domestic corporations generally at sixty per cent of fair and reasonable market value October 1 in each year less deductions of all property assessed directly by the corporation,

(c) Of insurance companies the same as domestic corporations generally less an additional deduction for United States and Alabama bonds owned,

(d) Of foreign corporations (unless listed and registered under a statute adopted in 1927) at sixty per cent of fair and reasonable market value October 1 in each year without any deductions;

(4) Pullman car company property is not valued for assessment but the company pays a flat annual amount in lieu of all other taxation;

(5) Property of railroads, public utilities, telephone and telegraph companies, etc., is assessed by the State Tax Commission instead of the County Tax Assessors and assessed value thereof determined by franchise and in-

tangible values not considered in assessing property of other types of corporations. Earnings, market values of securities, average number of cars operated in the State during the year, car miles operated, and like factors enter into the determination of assessed value by specific provision of the statute. The assessment is at sixty per cent of the value so determined.

General Acts of Alabama of 1919, page 282, Section 5;
General Acts of Alabama of 1923, page 152, Section 6;
General Acts of Alabama of 1927, page 139, Section 25;
General Acts of Alabama of 1923, page 152, Sections 74 & 76;
General Acts of Alabama of 1919, page 282, Sections 157 et seq.

We find these classifications and distinctions recognized and pronounced constitutional by the Alabama Supreme Court.

State v. Burchfield, 211 Ala. 30;
State v. Seals Piano Co., 209 Ala. 93;
Ceylon Co. v. Hawkins, 206 Ala. 246.

Classifications for specific exemptions which may be pertinent to the issues herein with the effective dates thereof have been as follows:

Mortgages upon which the recording privilege tax has been paid and the debts secured thereby, 1903 to date.

General Acts of Alabama of 1903, page 227;
Section 3022 Code of Alabama, 1923, appendix.

Money on deposit in banks, 1915 to date.

General Acts of Alabama of 1915, page 386, Section 2.

Solvent credits, 1919 to date.

General Acts of Alabama of 1919, page 282, Section 2.

Shares of building and loan associations, 1923 to date.

General Acts of Alabama of 1923, page 152, Section 8.

Shares of mortgage companies or corporations making loans on real estate or purchasing mortgages or mortgage notes on real estate and industrial loan companies or corporations, 1927 to date.

General Acts of Alabama of 1927, page 139, Section 25, appendix.

The dissenting opinion in this case contains a review of bank share taxation in Alabama. (Record, pages 43 to 46)

Since at least 1896 the State of Alabama has placed shares of state and national banks in the same classification by the same sentence of the same section of the same statute, taxing them at the same rate and providing the identical method for arriving at their taxable values, and since that time no discrimination has been attempted by the Legislature in favor of one and against the other.

Section 3911, subdivision 8, of the *Code of 1896*;
Section 2082, subdivision 8, of the *Code of 1907*;
General Acts of Alabama of 1911, page 159, Section 25;

General Acts of Alabama of 1915, page 386, Section 12;
General Acts of Alabama of 1919, page 282, Section 9;
General Acts of Alabama of 1923, page 152, Section 6 (Appendix).

Throughout the period covered by these statutes the State Legislature has enacted and re-enacted this legislation in accordance with the pronouncements of the Alabama Supreme Court in

Pollard v. State ex rel Zuber, 65 Ala. 628, and
State Bank v. Board of Revenue, 91 Ala. 217.

The State recognized the distinction between a tax on the bank and a tax on its shares pointed out by that Court as follows:

> " 'The tax on the shares is not a tax on the capital of the bank. The corporation is the legal owner of all the property of the bank, real and personal, and within the powers conferred upon it by the charter and for the purposes for which it was created, can deal with the corporate property as absolutely as a private individual can deal with his own.' 'The interest of the shareholder entitles him to participate in the net profits earned by the bank in the employment of its capital,' etc. 'This is a distinct, independent interest or property, held by the shareholder like any other property that may belong to him. Now, it is this interest which the act of Congress has left subject to State taxation under the limitations prescribed.' "
>
> *National Commercial Bank v. Mobile*, 62 Ala. 284.

And the State recognized and observed the statement of its distinguished jurist, Chief Justice Stone, in *State Bank v. Board of Revenue*, supra, that

> "bank shares in a National bank, and bank shares in a State bank, belong to one species of moneyed capital. Any attempt to draw a distinction between them, as subjects of taxation, would be futile."

Accordingly, for the purposes of this case it is clear that in prescribing a taxing structure Alabama has, within the limits of the State Constitution as construed by its Supreme Court, classified state and national bank shares as a single class of property for ad valorem taxation for many years.

No inference of any holding by the majority below with respect to a contrary intention of the Legislature at any time may be drawn from the Per Curiam majority opinion. On the contrary, the opinion carefully refrains from overruling *State Bank v. Board of Revenue*, 91 Ala. 217, seeking only to distinguish it, and Mr. Justice Gardner (one of the majority) writes for the Court in *Ward v. First National Bank of Hartford*, 142 So. 93 (not yet officially reported). In this opinion, to which there was no dissent, Mr. Justice Gardner takes care to point out that each case with respect to taxation of shares of national banks in the State must depend on its own facts with respect to whether or not untaxed monied capital in substantial amount is actually in competition with the particular bank. This opinion was announced by the Alabama Supreme Court one week prior to its decision in the case at bar. It precludes any idea on the part of that Court that anything the Legislature had done with other sections of the State Revenue Law in anywise intended to affect Section 6 with respect to bank shares:

> "Counsel, appearing as amicus curiae, insist that the court should judicially know that substantial competition by the moneyed capital enumerated above

reaches all national banks in the state, and that proof as to each complaining bank should not be considered necessary. But no authority is cited and none have come to our attention which would justify such a course. It remains, in our opinion, a matter of proof in each case."

We therefore assert, with confidence, that the shares of state and national banks are under the Alabama taxing statutes and the decisions of the Alabama courts a single class or species of property for the purposes of ad valorem taxation.

II.

The Majority and Minority Opinions of the Supreme Court of Alabama

In the opinion below the majority stated, "We are in full accord with the minority view that 'there is no semblance of justice in taxing the shares of state banks and excluding those of national banks.'" The minority did not discuss the Federal question involved, finding it unnecessary to go beyond what in their opinion was a violation of the uniformity clause of the State Constitution to reach a correct conclusion. The essence of the majority opinion is contained in the following paragraphs:

"The power to tax the stock in banks of the United States,—agencies of the National Government, in the accomplishment of its constitutional purposes,—is not an inherent power residing in the State, but a power delegated by Congress. Such agencies cannot be taxed except by the consent of Congress.—Cooley's Const. Law (8th Ed.), Page 991.

"In the exercise of this delegated power the Legislature must conform to the restrictions in the acts of

Congress delegating this power, otherwise the effort of the Legislature to exercise this power is abortive and void.—Ward, Tax Collector v. First National Bank of Hartford, MS; Mercantile Bank v. New York, 121 U. S. 138.

"The limitation on the power of the Legislature to levy a direct tax on property, found in sections 211 and 217 of our Constitution, is a limitation on the inherent power of the State, and not on the power to tax delegated by the Federal statute. The limitation on this power is found in Section 5219 of the United States Revised Statutes.—Maguire v. Board of Revenue and Road Commissioners of Mobile County, 71 Ala. 401; Pollard v. The State, ex rel. Zuber, 65 Ala. 628.

"Therefore, when the Legislature, in the exercise of the power delegated by the Federal statute efficaciously levies a tax on the stock of United States Banks, in conformity with the statute, such levy reflects the limitation embodied in the Constitution in respect to the levy on subjects of taxation within the inherent power of the State, and requires substantial uniformity. Such was the case dealt with in State Bank v. Board of Revenue, 91 Ala. 217.

"But where, as in the case at bar, the attempted exercise of the delegated power of taxation under the Federal statute is abortive, there is no basis for applying the limitation embodied in Section 217 of the Constitution to taxes levied in the exercise of the State's inherent power on domestic bank stock; therefore, the plaintiff was not entitled to recover."

* * * * * * *

"Like reasoning as outlined in this opinion leads to the conclusion that the State system of taxation here questioned violates no provision of the Fourteenth Amendment to the Constitution of the United States. —Ohio Oil Co. v. Conway, 281 U. S. 146." (R. 40-41)

It is respectfully submitted that the conclusions reached by the majority in the Court below are based on fundamental misconceptions of the applicable State and Federal constitutional provisions and are fallacious in proceeding upon the following mistaken premises:

(a) That the State, in taxing national bank shares, is exercising taxing power of the Federal Government delegated by it to the State and not by virtue of any inherent power residing in the State;

(b) That the limitations contained in Sections 211 and 217 of the Alabama Constitution are not limitations on the power of the State to tax national bank shares but only apply to that property taxed under the "inherent" power of the State;

(c) That the limitations of the State Constitution only apply when the State has efficaciously taxed national bank shares and do not apply when the effort is "abortive";

(d) It wholly fails to take account of the fact that the Legislature of Alabama has grouped or classified state and national bank shares as one species of property for taxation purposes and has not manifested any other or different intent than that they be treated alike.

It is too well established to admit of argument at this stage that the Federal and not the State government is the government exercising limited, enumerated or delegated powers. The Tenth Amendment to the Federal Constitution was passed to put that question beyond any doubt.

Congress, therefore, as we conceive the situation, could not and did not *delegate* the power to tax shares of national banks in the hands of individual citizens of the State, but merely consented to the withdrawal of any objection on the part of the government of the United

States to the exercise of the power to tax such shares already inherent in the States, provided uniformity in taxation be preserved, finding by such consent that as a matter of fact if uniformity is so preserved no improper burden will be imposed upon the Federal agencies, the national banks, or upon the shareholders thereof.

Mr. Justice Van Devanter, in *First National Bank v. Anderson,* 269 U. S. 341, 347, said, with reference to the power of the States to tax national bank shares:

> "National banks are not merely private moneyed institutions but agencies of the United States created under its laws to promote its fiscal policies; and hence the banks, their property, and their shares cannot be taxed under State authority except as Congress consents and then only in conformity with the restrictions attached to its consent. * * *"

The exact form of expression used by Mr. Justice Swayne in *Farmers & Merchants National Bank v. Dearing,* 91 U. S. 29, is:

> "* * * In the complex system of polity which obtains in this country, the powers of government may be divided in four classes:
>
> "Those which belong exclusively to the States;
>
> "Those which belong exclusively to the National Government;
>
> "Those which may be exercised concurrently and independently by both;
>
> "And those which may be exercised by the States, but only with the consent, express or implied, of Congress.
>
> "Whenever the will of the nation intervenes exclusively in this class of cases, the authority of the State retires and lies in abeyance until a proper oc-

casion for its exercise shall recur. *Gilman v. Philadelphia,* 3 Wall. 713 (70 U. S. XVIII, 96); *Ex parte McNiel,* 13 Wall. 240 (80 U. S. XX, 625).

"The power of the States to tax the existing national banks lies within the category last mentioned."

Other cases dealing with the power of the States to tax Federal agencies are *Union Pacific Railroad Company v. Peniston,* 18 Wall. 5, and *Thomson v. Union Pacific Railroad Company,* 9 Wall. 579.

If our view of these authorities is correct, the holding of the majority that national bank shares are taxed under power *delegated* by the Federal Government and that this fact forms any basis for classification is unsound.

Regardless, however, of whether national bank shares are taxed under a delegated power or taxed under State sovereign power exercised with reference to them after Congress has lifted the immunity with which they were cloaked, the limitations of the State Constitution apply to the power of the State to tax them just as effectually and to the same extent that such limitations are applicable to the taxation of any other property located within the State.

If only the limitations contained in Section 5219 of the U. S. Revised Statutes are applicable to the power of the State to tax national bank shares, then if Congress should amend the section so as to repeal all limitations on the power of the State to tax, the State would have carte blanche authority to tax them without even conforming to the State constitutional limitations. Such a result would obviously violate the Fourteenth Amendment.

This Court in *Cummings v. Merchants National Bank,* 101 U. S. 153, in considering the rights of a national bank to protection under State constitutional provisions, said:

"But the Bank has the same right, under the laws and Constitution of Ohio, to be protected against unjust taxation that any citizen of that State has, and by virtue of its organization under the Act of Congress it can go into the courts of the United States to assert that right; so that if the assessment on its shares was a violation of the constitutional provision of that State concerning uniformity of taxation, the Circuit Court had jurisdiction of that question, concurrent with the State Courts, and we must review its decision."

See also *San Francisco National Bank v. Dodge,* 197 U. S. 70.

The majority of the Alabama Supreme Court did not hold that the Legislature had not intended to classify or had not classified state and national banks as one species of property. On the contrary, the legislative history of the State already reviewed shows that such shares had for many years been classified together and taxed alike. National banks for a long time were efficaciously taxed,—certainly until the state began its policy of exempting or failing to tax monied capital generally and, for aught that appears, until about 1930 and during that state tax year so far as this petitioner is involved.

It will be noted that the majority in the court below were careful not to overrule State Bank v. Board of Revenue, 91 Ala. 217, but in effect sought to distinguish it (R. 40), while the minority adhere strictly to that precedent. (R. 50-51) As that precedent is not overruled, the declaration therein is the law in Alabama as to legislative classification of bank shares for taxation. A pertinent discussion from the opinion in that case is as follows:

"What we do decide is, that whenever the legisla-

ture levies a tax on property, the rate must be in exact proportion to the value of such property; and that if a tax is imposed on any species of property, all property belonging to that species must be taxed at the same rate, whether it belongs to an individual, an association of persons, or to a private corporation. We mean by this, not only that, in this regard, natural persons, individuals or companies stand on the same footing with private corporations, but also that each individual association, or private corporation, is, under our constitution, endowed with the same rights, and subject to the same burdens, as are enjoyed or suffered by every other natural person, association of persons, or private corporation. The following authorities render it unnecessary for us to go into the argument at greater length.—Mayor of Mobile v. Stonewall Ins. Co., 53 Ala. 570; State Auditor v. Jackson County, 65 Ala. 142; Maguire v. Board of Revenue, 71 Ala. 401. See, also, Nat. Commercial Bank v. Mayor, 62 Ala. 284; Sumter Co. v. Nat. Bank, Ib. 464; Perry Co. v. Railroad, 65 Ala. 391; Pollard v. State, ex rel., Ib. 628.

"We need scarcely say that bank shares in a National bank, and bank shares in a State bank, belong to one species of moneyed capital. Any attempt to draw a distinction between them, as subjects of taxation, would be futile. In assessing the one, our statute allows a deduction of the taxpayer's indebtedness, and taxes the surplus. In assessing the other, it allows no such deduction. We hold that this is a violation of section 6, Art. XI of Alabama's Constitution, and that the shareholders in State banks are entitled to the same deductions as the statute accords to the shareholders of National banks."

The majority would distinguish both with respect to the provisions of the State Constitution and of the Fourteenth

Amendment between a differential within the same class or species of property where some tax is assessed on a part and a different tax is assessed on the other part of the class and such a differential where some tax is assessed on a part and no tax is assessed on the other part of the same class.

Our contention in the court below with respect to the State Constitutional question involved was suggested by the provisions of Sections 211 and 217 of the Constitution of Alabama. Section 211 provides, "All taxes levied on property in this State shall be assessed in exact proportion to the value of such property," and Section 217 provides, "The property of private corporations, associations and individuals in this State shall forever be taxed at the same rate." Essentially, these provisions of the State Constitution bear a close analogy to the purpose and intent of the Fourteenth Amendment and the majority opinion seeks to avoid the problem presented both by the State and Federal Constitutions by falling back upon the principle that exemptions and classifications for taxation purposes may be made within the limits that they shall not be arbitrary and unreasonable. We quote two paragraphs of the majority opinion which deal with this subject:

> "Upon the question of taxation, the Legislature of this State had the power to make exemptions and classifications free from interference by the courts unless there results inequality, not only oppressive in its operation, but so glaring as that it can be judicially declared to be founded on arbitrary and capricious principles, without the just semblance of reason. Subject to this limitation the legislative power to select proper subjects of taxation and to classify them upon principles which to them seem just, cannot be circumscribed by the courts. There must be, of

necessity, left a liberal scope for the free exercise of this presumably wise discretion.—Moog v. Randolph, 77 Ala. 597.

"Upon this well recognized principle the system of classification and exemption by the legislature as to moneyed capital is a matter resting within the law-making power, and is not such as to justify the interference by the court." (R. 41)

The minority opinion we think properly reaches the conclusion that under the requirements as to uniformity of taxation found in the State Constitution state bank shares might not be taxed at all if national bank shares wholly escaped taxation for any reason. It properly recognizes the shares of both as one and the same class or species of property for taxation.

Nothing in the Fourteenth Amendment prevents a state from "adjusting its system of taxation in all proper and reasonable ways." Our contention with respect to the error of the majority below fully recognizes this well settled rule. An analysis or a discussion of the many decisions relating to the effect of the Fourteenth Amendment upon state taxation of all sorts is unnecessary in this Court, which has so frequently reviewed the applicable rules.

The majority opinion of the Court below cites *Ohio Oil Company v. Conway*, 281 U. S. 146, as authority that petitioner's rights under the Fourteenth Amendment were not violated. In that case this Court considered a statute adopted by the State of Louisiana imposing a graduated excise severance tax on oils. Varying amounts of taxes were levied according to the gravity of each kind of oil, but as all oils of the same gravity were taxed alike, it was held that the statute did not violate the Fourteenth Amend-

ment. We fail to perceive wherein that ruling militates in any way against petitioner's claim in the present case. The controlling principles in the case were clearly defined by Mr. Chief Justice Hughes, who delivered the opinion. We quote from the opinion as follows:

> "With all this freedom of action, there is a point beyond which the state can not go without violating the equal protection clause. The state may classify broadly the subjects of taxation, but in doing so it must proceed upon a rational basis. The state is not at liberty to resort to a classification that is palpably arbitrary. The rule is generally stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' "

The point of importance in this connection is not the right of the State to properly adjust its tax system, so often reasserted by this Court, but the rights of citizens of the State to equality of treatment within a properly selected and designated classification for taxation made by the State in that process of adjustment.

The effort to tax national banks was not abortive for it was legally effective for many years and the tax became ineffective with respect to certain national banks in the State of Alabama only after a long period of time and upon the incidence of new facts, i. e., actual competition with the business of the two national banks in Montgomery. This result came about, not because of the adoption of a different system or method of taxing state and national bank shares, but because of exemptions of other property which, so far as this record develops, later became competitive.

Since 1896, as noted above, the State of Alabama has attempted to conform its taxation of monied capital in competition with banks and of the shares of banks to the limitations imposed by Section 5219. For many years not only monied capital in competition with banks as such but all monied capital was taxed alike by the State.

Under the decisions of this Court monied capital, untaxed or taxed at a different rate from national bank shares, must have been in existence in substantial amount and in actual or potential competition with the authorized businesses of national banks within the State in anywise to affect the taxation of shares of national banks under Section 5219.

Mercantile National Bank v. New York, 121 U. S. 138;
Merchants National Bank v. Richmond, 256 U. S. 635;
First National Bank v. Anderson, 269 U. S. 341;
First National Bank of Hartford v. Hartford, 273 U. S. 548;
Minnesota v. First National Bank of St. Paul, 273 U. S. 561;
Georgetown National Bank v. McFarland, 273 U. S. 568.

The case from Kentucky last above cited was decided adversely to the bank because the record failed to disclose the existence of such monied capital, in favor of which discrimination in taxation was practiced, in substantial amount and in actual competition with the complaining bank.

It was contended on the trial below, and it may be contended by the attorneys for respondent in this Court, that when the Legislature exempted capital which was or

might become competitive it by such action classified and intended to classify national bank shares in a different manner than had formerly been employed, that is, the Legislature intended to exempt such shares and to tax state bank shares. The majority of the Alabama Supreme Court did not, and we submit could not, have gone that far for the reason that Section 6 of the 1923 Act still remained when this proceeding was instituted in the same form as when enacted in 1923 and the Legislature has manifested no intent, either express or implied, that it be changed.

As previously noted, the decision of the Alabama Supreme Court in the case of *Ward v. First National Bank of Hartford,* 142 Sou. 93, not yet officially reported, which was rendered on May 12, 1932, just a week prior to the decision in the case at bar, is very significant in this connection in that the Court declined to hold that there were no national bank shares in the State which were not for the same state tax year as is herein involved taxable under the provisions of Section 6 of the 1923 Act. We repeat the quotation from that opinion as follows:

> "Counsel, appearing as amicus curiae, insist that the court should judicially know that substantial competition by the moneyed capital enumerated above reaches all national banks in the state, and that proof as to each complaining bank should not be considered necessary. But no authority is cited and none have come to our attention which would justify such a course. It remains, in our opinion, a matter of proof in each case."

If the burden is still on each complaining national bank in the State to show actual competition with untaxed monied capital, then the Legislature has not repealed Sec-

tion 6 insofar as it applies to national banks which cannot establish that they are in actual competition with exempt moneyed capital.

So in Alabama, insofar as national bank shares are concerned, the adjustment of the State's taxing system by the introduction of exemptions prior to October 1, 1930, when the tax in this case arose, did not necessarily result in a violation of Section 5219. Insofar as the Fourteenth Amendment might apply under the decisions mentioned, the shares of no national bank were free of the state levy in the absence of untaxed or favored monied capital in substantial amount and actually employed in competition or potential competition with the authorized businesses of that particular bank. The action of the Alabama Legislature in introducing new exemptions from time to time was not necessarily in anywise counter to the limitations imposed by Section 5219. Actual and substantial competition directly with a national bank on the part of the exempted monied capital was required to exist to permit of successful complaint by the national bank. So if *Ward v. First National Bank of Hartford, supra,* correctly states the views of the Alabama Supreme Court (it was a unanimous decision) there has never been any legislative action or intent to change that classification and no inference to the contrary may be drawn from that Court's decision in this case rendered within a week of its decision in that case.

The majority opinion below therefore, stripped of dicta and immaterialities, holds only, in its attempt to distinguish *State Bank v. Board of Revenue, supra,* that if the shares of a national bank be taxed at all in Alabama the shares of a competing state bank shall not bear a heavier tax burden, but that if the shares of a particular national bank escape taxation by reason of the existence of un-

taxed or favored competitive capital, the shares of a competing state bank may be made to bear alone a tax burden.—This, in spite of the declared policy of the State to prescribe equality of treatment to both. Such a doctrine, we submit, obviously infringes the Fourteenth Amendment and the State Constitution as well.

If the majority opinion had held (and we do not think it is susceptible to this interpretation) that the legislature expressly intended to exempt shares of national banks, this construction would not be binding on this Court as to rights secured by the Federal Constitution. We quote from the holding in the case of *St. Louis S. W. R. Co. v. Arkansas ex rel. Norwood,* 235 U. S. 350, as follows:

> "Upon the mere question of construction we are, of course, concluded by the decision of the state court of last resort. But when the question is whether a tax imposed by a state deprives a party of rights secured by the Federal Constitution, the decision is not dependent upon the form in which the taxing scheme is cast, nor upon the characterization of that scheme as adopted by the state court. We must regard the substance, rather than the form, and the controlling test is to be found in the operation and effect of the law as applied and enforced by the state."

An even stronger case in point is *Spraigue v. Thompson,* 118 U. S. 90. There the State of Georgia enacted a statute prescribing certain pilotage fees and regulations which the Supreme Court of Georgia held good as to its remaining enactments in spite of the admitted invalidity of certain provisions therein which conflicted with an express Federal statute prohibiting the States to make regulations or provisions with respect to pilotage making any

discrimination as to the rates of pilotage, etc., Section 4237, U. S. Revised Statutes. Quoting from the opinion:

> "It was held, however, by the Supreme Court of Georgia, in the case now before us, that so much of the section as makes these illegal exceptions may be disregarded, so that the rest of the section as thus read may stand, upon the principle that a separable part of a statute which is unconstitutional may be rejected, and the remainder preserved and enforced. But the insuperable difficulty with the application of that principle of construction to the present instance is, that by rejecting the exceptions intended by the Legislature of Georgia the statute is made to enact what confessedly the Legislature never meant. It confers upon the statute a positive operation, beyond the legislative intent and beyond what anyone can say it would have enacted in view of the illegality of the exceptions. We are, therefore, constrained to hold that the provisions of section 1512 of the Code of Georgia cannot be separated so as to reject the unconstitutional exceptions merely, and that the whole section must be treated as annulled and abrogated by section 4237 of the Revised Statutes."

In *Poindexter v. Greenhow*, 114 U. S. 270, 29 L. Ed. 185, in the face of issuance of bonds by the State of Virginia coupons on which were provided to be acceptable in payment of State taxes the Assembly passed a statute with respect to delinquent tax collections which did not preserve the right to pay in such coupons. The court held that the whole statute fell, saying:

> "It is undoubtedly true that there may be cases where one part of a statute may be enforced as constitutional, and another be declared inoperative and void, because unconstitutional; but these are cases

where the parts are so distinctly separable that each can stand alone, and where the court is able to see and to declare, that the intention of the Legislature was that the part pronounced valid should be enforceable, even though the other part should fail. To hold otherwise would be to substitute for the law intended by the Legislature one they may never have been willing by itself to enact. An illustration of this principle is found in the *Trade-Mark Cases*, 100 U. S. 82, (Bk. 25, L. Ed. 550), where an Act of Congress, which, it was claimed, would have been valid as a regulation of commerce with foreign nations and among the States, was held to be void altogether, because it embraced all commerce, including that between citizens of the same State, which was not within the jurisdiction of Congress, and its language could not be restrained to that which was subject to the control of Congress. 'If we should,' said the court in that case (page 99), 'in the case before us undertake to make, by judicial construction, a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do.'

"Indeed it is quite manifest, from the face of the laws themselves, that they are together but parts of a larger whole."

Note also *Baldwin v. Franks*, 120 U. S. 678 and *United States v. Ju Toy*, 198 U. S. 253.

It is respectfully submitted that any contention that the legislature intended to exempt national bank shares from the provisions of Section 6 of the 1923 Act is refuted by the fact that the Supreme Court of Alabama in *Ward v. First National Bank of Hartford*, supra, has declined to so hold and also by an examination of the statutes themselves. Furthermore, such a position is imputing to the

legislature an intention to classify in a manner which the majority and dissenting opinions characterize as having "no semblance of justice."

The State having classified state and national bank shares under the same statute and in the same scheme of taxation, they are both entitled to equality of treatment and any discrimination in favor of one as against the other is violative of the Fourteenth Amendment.

The case of *Central State Bank v. Bennett*, 284 U. S. 239, appears to have definitely decided this question in the particular application to taxation of state and national bank shares.

The same principle has many times been announced and applied by this Court, by the lower Federal courts and by the State courts. We quote from the opinion of Mr. Chief Justice Taft in *Sioux City Bridge Company v. Dakota County, Nebraska*, 260 U. S. 441, as follows:

> "In the case of Sunday Lake Iron Co. v. Wakefield Twp., 247 U. S. 350, 352, 353, 62 L. ed. 1154-1156, 38 Sup. Ct. Rep. 495, this court said:
>
> " 'The purpose of the equal protection clause of the 14th Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. And it must be regarded as settled that intentional, systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property.' " Citing
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> Raymond v. Chicago Union Traction Co., 207 U. S. 20, 35, 37, 52 L. ed. 78, 87, 88, 28 Sup. Ct. Rep. 7, 12 Ann. Cas. 757;

Greene v. Louisville & Interurban R. Co., 244 U. S. 499, 516-518, 61 L. ed. 1280, 1289, 1290, 37 Sup. Ct. Rep. 673, Ann. Cas. 1917E, 88;
Cummings v. Merchants' Natl. Bank, 101 U. S. 153, 160, 25 L. ed. 903, 905;
Taylor v. Louisville & N. R. Co., 31 C. C. A. 537, 60 U. S. App. 166, 88 Fed. 350, 364, 365, 372, 374;
Louisville & N. R. Co. v. Bosworth, 209 Fed. 380, 452;
Washington Water Power Co. v. Kootenai County, 270 Fed. 369, 374.

It was further stated in the same opinion:

"The dilemma presented by a case where one or a few of a class of taxpayers are assessed at 100 per cent of the value of their property, in accord with a constitutional or statutory requirement, and the rest of the class are intentionally assessed at a much lower percentage, in violation of the law, has been often dealt with by courts, and there has been a conflict of view as to what should be done. There is no doubt, however, of the view taken of such cases by the Federal courts in the enforcement of the uniformity clauses of state statutes and constitutions, and of the equal protection clause of the 14th Amendment. The exact question was considered at length by the circuit court of appeals of the sixth circuit in the case of Taylor v. Louisville & N. R. Co., 31 C. C. A. 537, 60 U. S. App. 166, 88 Fed. 350, 364, 365, and the language of that court was approved and incorporated in the decision of this court in Greene v. Louisville & Interurban R. Co., 244 U. S. 499, 516-518, 61 L. ed. 1280, 1289, 1290, 37 Sup. Ct. Rep. 673, Ann. Cas. 1917E, 88."

The case of *Ashland County Bank et al. v. Village of Butternut,* 241 N. W. 638 (not yet officially reported), decided by the Supreme Court of Wisconsin on March 8, 1932, is essentially identical with the case at bar. But the Wisconsin court reached a different conclusion from the majority of the Alabama Supreme Court. The Wisconsin court held that, as the State legislature had failed to tax all capital substantially competing with national banks but taxed only such competitive capital as was employed in a banking or investment business, the tax levied on national bank shares was ineffective as to them because of the violation of Section 5219 and was therefore also ineffective as to state bank shares because violative of the Fourteenth Amendment. We quote from the opinion as follows:

> "Since the laws mentioned were void as to national banks, the conclusion inevitably follows that they were also void as to state banks, for the reason that, since national banks could not be taxed thereunder, neither could state banks because state banks would thereby be subjected to a higher rate of taxation than national banks in violation of the Fourteenth Amendment to the Constitution of the United States.
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> * * * * * * *
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> "That the constitutional rights guaranteed to the plaintiff by the Fourteenth Amendment were violated seems now, in view of the recent decision of the Supreme Court of the United States in Iowa-Des Moines Nat. Bank v. E. R. Bennett, 284 U. S. 239, 52 S. Ct. 133, 135, 76 L. Ed. ..., decided December 14, 1931, no longer an open question."

Other state cases in which similar holdings have been made with respect to resulting violations of state consti-

tutional provisions prescribing uniformity in taxation are

State Bank v. Board of Revenue, 91 Ala. 217;
Central National Bank v. Sutherland, 113 Neb. 126;
State Bank v. Endres, 109 Neb. 753;
Voran v. Wright, 129 Kansas 601;
Commercial State Bank v. Wilson, 53 South Dakota 82;
State v. Mady, 83 Montana 418;
Security Savings Bank v. Board of Review, 189 Iowa 463.

See also *Munn v. Des Moines National Bank,* 18 Fed. (2nd series) 269.

The minority of the Alabama Supreme Court were of the opinion that the principles laid down in *State Bank v. Board of Revenue,* 91 Ala. 217, supra, controlled in the present case. The majority opinion, however, seeks to differentiate that holding from the facts and applicable legal conclusions obtaining in the present case.

While the same or substantially the same questions here presented have been considered by many courts, we have failed to find any court holding in line with the opinion of the majority. Every other court which has passed on these questions appears to have reached an opposite conclusion.

III.

Pretermitting here, for argument only, our position and earnest insistence that Alabama has already classified state and national bank shares alike for taxation and that under the Fourteenth Amendment they should be accorded equality of treatment, it is respectfully submitted that national and state bank shares are so essentially similar that the State, having the right to tax both, can

not in its scheme of taxation discriminate in favor of one and against the other.

We had thought, until the decision of the majority in the case at bar, that this question had been settled in Alabama, insofar as the State Constitution was concerned, by the Alabama Supreme Court in *State Bank v. Board of Revenue,* 91 Ala. 217. We again quote from the opinion:

> "We need scarcely say that bank shares in a national bank, and bank shares in a state bank, belong to one species of monied capital. Any attempt to draw a distinction between them, as subjects of taxation, would be futile."

In the opinion of the Supreme Court of South Dakota in *Commercial State Bank v. Wilson,* 53 South Dakota 82, it was said:

> "There is no practical difference between the business of national banks and state banks, and it would hardly seem reasonable that a different classification for the purpose of taxation should be applied to one than is applied to the other."

The rule has been many times stated by this Court that arbitrary classifications not resting upon some reasonable grounds of difference are forbidden by the Fourteenth Amendment. In *Royster Guano Company v. Virginia,* 253 U. S. 412, Mr. Justice Pitney, writing for the Court, said:

> "Numerous and familiar decisions of this court establish that they have a wide range of discretion in that regard. But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial

relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

Mr. Justice McReynolds, in *Sunday Lake Iron Company v. Wakefield,* 247 U. S. 350, stated the rule as follows:

> "The purpose of the equal protection clause of the 14th Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents."

In *Power Manufacturing Company v. Saunders,* 274 U. S. 490, Mr. Justice Van Devanter, writing for the Court, said:

> "The clause in the 14th Amendment forbidding a state to deny to any person within its jurisdiction the equal protection of the laws is a pledge of the protection of equal laws (Truax v. Corrigan, 257 U. S. 312, 333, 66 L. ed. 254, 263, 27 A. L. R. 375, 42 Sup. Ct. Rep. 124; Atchison, T. & S. F. R. Co. v. Vosburg, 238 U. S. 56, 59, 59 L. ed. 1199, 1200, L. R. A. 1915E, 953, 35 Sup. Ct. Rep. 675), and extends as well to corporate as to natural persons (Smyth v. Ames, 169 U. S. 466, 522, 42 L. ed. 819, 840, 18 Sup. Ct. Rep. 418; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 154, 41 L. ed. 666, 667, 17 Sup. Ct. Rep. 255; Santa Clara County v. Southern P. R. Co., 118 U. S. 394, 396, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132). It does not prevent a state from adjusting its legislation to differences in situation or forbid classification in that connection; but it does require that the classification be not arbitrary, but based on a real and substantial difference having a reasonable relation to the subject of the particular legislation."

State and national banks conduct substantially the same character of business and they are invariably, where located in the same communities, engaged in the keenest competition. The record (pages 32 and 33) shows that the business carried on and transacted by two national banks located in the City of Montgomery was in actual and substantial competition with the business of petitioner.

It is perhaps needless to say that if the State can levy a tax on shares of state banks and wholly exempt national bank shares and all other forms of monied capital in competition with state banks, the latter banks could not long survive. Such a system is so manifestly unfair and places state banks at such an obvious disadvantage in the keenly competitive world of business that it would be impossible in many instances for the state institutions to carry on: yet it is this system that the majority of the Court below have sanctioned.

The same rule would of course work both ways, that is, if there were no Congressional limitations contained in the statute allowing states to tax national bank shares, the State could, under the holding of the majority below, exempt state bank shares and all other competing capital and assess shares of national banks at the full rate.

It is respectfully submitted there are no sufficient differences between the shares of national and state banks to justify arbitrary classification by the State in favor of one and against the other. National banks are for many purposes considered the same as if residents of the state in which they are domiciled,—their shareholders are certainly so treated.

Our examination of the authorities fails to disclose that this Court has ever had occasion to pass on the question as to whether a discrimination against national bank

shares and in favor of state bank shares or other competitive capital would violate the Fourteenth Amendment. If no such case has arisen it is easily understandable for the reason that it has only been necessary to consider Section 5219 of the U. S. Revised Statutes, which affords as much if not more protection with respect to taxation of national bank shares than does the Fourteenth Amendment.

Analogous facts in other cases decided by this Court appear to lead to the conclusion that state and national bank shares are one species of property within the meaning of the Fourteenth Amendment. In *Southern Railway Company v. Greene*, 216 U. S. 400, it was held that the State could not subject a foreign corporation which had already come into the State and acquired property of a fixed and permanent nature to a new and additional franchise tax which was not imposed on domestic corporations. In the opinion delivered by Mr. Justice Day it was stated:

> "The equal protection of the laws means subjection to equal laws, applying alike to all in the same situation. If the plaintiff is a person within the jurisdiction of the State of Alabama within the meaning of the Fourteenth Amendment, it is entitled to stand before the law upon equal terms, to enjoy the same rights as belong to, and to bear the same burdens as are imposed upon, other persons in a like situation."

If in the above case it had appeared that the State of Alabama had assessed the additional franchise tax against domestic corporations and had exempted from the tax foreign corporations doing business in the State, it is respectfully submitted that the tax on domestic corpora-

tions would have been held invalid as violative of the Fourteenth Amendment.

In *Quaker City Cab Company v. Pennsylvania*, 277 U. S. 389, it was held that the imposition of a tax on the gross receipts of corporations operating taxicabs but not imposing a like tax on individuals and partnerships engaged in the same business unconstitutionally deprived foreign corporations operating in the State of the equal protection of the laws. We quote from the opinion prepared by Mr. Justice Butler:

> "The equal protection clause does not detract from the right of the state justly to exert its taxing power or prevent it from adjusting its legislation to differences in situation or forbid classification in that connection, 'but it does require that the classification be not arbitrary but based on a real and substantial difference having a reasonable relation to the subject of the particular legislation.' Power Mfg. Co. v. Saunders, 274 U. S. 490, 493, 71 L. ed. 1165, 1167, 47 Sup. Ct. Rep. 678. It is established that a corporation, by seeking and obtaining permission to do business in a state does not thereby become bound to comply with, or estopped from objecting to, the enforcement of its enactments that conflict with the Constitution of the United States."

In this connection see also

Cumberland Coal Company v. Board of Revision of Tax Assessments in Greene County, Pennsylvania, 284 U. S. 23;

Raymond v. Chicago Union Traction Company, 207 U. S. 20;

Sioux City Bridge Company v. Dakota County, 260 U. S. 441;

Carpenter v. Shaw, 280 U. S. 363;
Ward v. Love County, 253 U. S. 17;
Louisville Gas & Electric Company v. Coleman, 277 U. S. 32;
Airway Electric Appliance Corporation v. Day, 266 U. S. 71;
Schlesinger v. Wisconsin, 270 U. S. 230.

It has been contended that if the State in taxing state banks had to conform to the same system that it was required to follow with reference to national banks, it would destroy the State's power of classification. This contention is forcefully answered by the opinion delivered by Chief Justice Callaway of the Supreme Court of Montana in *State v. Mady,* 82 Montana 418:

> "It is argued that by thus restricting the taxation of national bank shares Congress has restricted, and may destroy, the State's power to classify property for the purposes of taxation. In one view this is a potent argument, but upon mature consideration we do not think it controlling. That Congress may not interfere with the taxation of property which it is the exclusive right of the State to tax will not be questioned. The difficulty here arises chiefly upon the requirements of the State Constitution. It requires the taxation of all property not exempt, and that the tax must be uniform upon the same class of subjects. The congressional requirement we are considering is not inconsistent with our constitutional provision requiring uniformity. It is thus our own fundamental law, acting co-ordinately with the law of Congress, which compels the State to tax State as well as national bank shares upon the same basis. The classification law placing national bank stock in class 6 and money coming into competition with the business of national banks in class 5 contravenes the provisions

of section 5219. To that extent the classification law was and is invalid; it is not lawful to tax national bank stock on the 40 per cent basis. Conceding that it is proper under the law to tax it on the 7 per cent basis, we find the law attempting to tax the State bank stock on the 40 per cent basis—property of exactly the same kind—a clear violation of the constitutional uniformity requirement. The State does not abrogate any part of its taxing power because it yields to Congress with respect to the taxation of a species of property which it could not tax without the consent of Congress, when its own fundamental law compels it to tax similar property upon the same basis on which it taxes property subject to the restrictions of Congress."

The State having the undoubted power to tax national bank shares at the full rate that it taxed other property, cannot arbitrarily decline to exercise this power and at the same time impose a tax on other subjects of the same class, viz.: state bank shares, without violating the equality clause of the Fourteenth Amendment. If it desires to tax one part of a class of taxable property it must tax all in that class. If the State were not allowed to assess the full rate of tax or impose a tax burden on shares of national banks equal to that which it could impose on other taxable subjects a different question would be presented, but that is not an issue involved in this case.

IV.

The record shows that during the years 1930, 1931 and 1932 there were building and loan associations, industrial loan companies and corporations and industrial banks in Montgomery which loaned money in substantial and actual competition with petitioner to the extent of hundreds of

thousands of dollars and that the shares of capital stock and the capital of such institutions were exempted from the assessment or payment of ad valorem taxes; that there were also mortgage companies and corporations and other individuals, persons, firms and associations engaged in like business and employing monied capital to the extent of many thousands of dollars in competition with petitioner, which were untaxed or exempted from taxation. (R. pp. 31-32)

If corporations are engaged in the same lines of business and are actually and substantially competing with each other, a system taxing the shares of a portion of such corporations without taxing all is a discrimination, and one which under the authorities of this Court appears to be in violation of the Fourteenth Amendment.

In *Royster Guano Company v. Virginia,* 253 U. S. 412, supra, it was held that a classification of Virginia corporations exempting those which did no business in the State except the holding of stockholders' meetings therein and imposing an income tax on those doing business in the State or doing business both within and without the State was illegal.

In the case at Bar, national and state banks and other corporations are all transacting similar lines of business in the same locality within the State. If the State exempts the shares of any such corporations from taxation, it must accord the same privilege and equality of treatment to all. In this connection we again call attention to the decisions of this Court hereinabove cited:

> *Cumberland Coal Company v. Board of Revision of Tax Assessments in Greene County, Pennsylvania,* 284 U. S. 23;

Raymond v. Chicago Union Traction Company, 207 U. S. 20;
Sioux City Bridge Company v. Dakota County, 260 U. S. 441;
Ward v. Love County, 253 U. S. 17;
Louisville Gas & Electric Company v. Coleman, 277 U. S. 32;
Airway Electric Appliance Corporation v. Day, 266 U. S. 71;
Schlesinger v. Wisconsin, 270 U. S. 230;
Quaker City Cab Company v. Pennsylvania, 277 U. S. 389.

V.

Briefly stated, the position of the respondent herein as disclosed by respondent's reply brief to the petition for writ of certiorari herein is as follows:

(1) Alabama may, without infringing either its own Constitution or the Fourteenth Amendment, adjust its tax system as it may see fit. This we, of course, concede to be a correct statement of the law provided that no arbitrary, capricious or unreasonable discriminations be made in the process of that adjustment.

(2) The failure to levy a valid tax against national bank shares does not invalidate the taxation of petitioner's shares. This we do not concede for obvious reasons. Alabama has in the adjustment of its tax system classified different types of property for the purposes of ad valorem taxation. Notably, as outlined above, it has treated inventories on a different basis for assessment than tangible property generally, it has treated corporate shares in different ways, it has treated railroad and public utility properties on a basis for taxation substantially different from manufacturing and mercantile properties generally

and it has, with the approval of the State Supreme Court, otherwise classified the property selected by it for taxation by prescribing substantially different methods of determining assessed values for taxation. As between classes it has prescribed different dates as of which assessed values are to be fixed and different elements to be the yardstick in fixing that value. In that process of classification it has, since 1896, exercised its right to tax the shares of national banks within its boundaries and classified together as a single class the shares of national and state banks. That classification has never been repealed. For years that classification has stood without change and without challenge until as a result of a new practice of exemption which for the year herein involved resulted in no taxation of certain competitive property the limitations imposed by Section 5219 of the U. S. Revised Statutes were violated. Then some of the national banks in the State naturally made the challenge, and successfully.

Respondent asks the question, "Does and can the exemption of national banks by indirection have any different effect" from action by the State had it "declined to attempt the taxation of national banks entirely?" Could a discrimination have been complained of had it so declined?

The fallacy of the suggestion in these questions lies in the fact that Alabama did not decline the attempt. On the contrary, for years it has treated the shares of national banks as part of the body of property subject to taxation by it. And for years it has classified them with the shares of state banks in accordance with the facts, for they are together a single class. Never expressly or by inference has the State Legislature repealed the statute, or any part of the statute, through which this result was intended.

The statement by the Alabama Supreme Court in *Ward v. First National Bank of Hartford, supra,* establishes without dispute that Court's view that the Alabama statute with respect to taxation of bank shares might effectually reach the shares of particular national banks in the State which could not prove the existence of untaxed property directly competitive with their business. In fact, the Legislature never evidenced the slightest intent to alter or amend the statute.

Having the undoubted right to tax the shares of national banks within the limits of Section 5219 of the U. S. Revised Statutes, it by no means follows that Alabama might, in disregard of the Fourteenth Amendment, decline to exercise that right and yet practice an arbitrary and capricious discrimination and tax the shares of state banks—property in the same class in fact and declared to be in the same class by its courts and by its Legislature in obedience to that declaration by its courts.

The discussion with respect to non-taxation of the personal property of banks and the real estate and electric plants of the Federal Government at Muscle Shoals has no bearing on this case for the State has never had the right to tax either.

(3) That the result of the petitioner's claim might in some way "narrow and descend until everybody is exempt."

This clearly is not the result. Actually there is and has been for years property classification in the Alabama tax system. Though the rate is uniform, the method of determining assessed values in different classifications is far from uniform. The thought that Congress by Section 5219 imposes its will on the State is erroneous. On the contrary, it permits the State to do what it should in all

conscience do, and what it has through its Legislature intended should be done—that is, tax with equality of burden property held by its citizens—bank shares—classified together with other such property within its borders. Exemptions added from time to time to the State taxing system do not alone bring about the result of which petitioner complains but only when coupled with a resulting exemption of property actually in competition with a national bank in each instance. When such a condition ensues, the Legislature must again act specifically if it would continue to reach the single class sought to be burdened so that the burden may fall equally on all in that class.

VI.

Central State Bank v. Bennett

In December, 1931, this Court rendered its decision in *Central State Bank v. Bennett,* 284 U. S. 239.

The record in that case discloses that the Iowa Constitution specifically permitted classification for taxation but required uniformity of treatment within each class. The statute under which the controversy arose classified together and levied a tax at the same rate upon the shares of national and state banks and monied capital and the shares of corporations in competition with the business of national banks. It classified separately and taxed at lower rates intangibles generally including, presumably, monied capital and shares of corporations not in competition with the business of national banks. In administering these laws the state officials systematically discriminated against bank shares in applying the second levy to some of the competitive property in the first named class.

In the opinion of this Court Mr. Justice Brandeis first points out that the practice of the State of Iowa in administering its laws clearly violated the limitations imposed by Section 5219 of the U. S. Revised Statutes insofar as the Iowa-Des Moines National Bank (the plaintiff in one of the cases covered by the decision) was concerned.

Turning to the *Central State Bank* case he says:

> "Both petitioners claim that they have been subjected to intentional, systematic discrimination in violation of the equal protection clause of the 14th Amendment. The federal right of the Central State Bank rests wholly upon that clause. It is assumed that there was such inequality of treatment as the Constitution prohibits.
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> * * *
>
> "The right invoked is that to equal treatment; and such treatment will be attained if either their competitors' taxes are increased or their own reduced. But it is well settled that a taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of federal law, cannot be required himself to assume the burden of seeking an increase of the taxes which the others should have paid."

In that case, as here, the State had by statute classified together the shares of state and national banks. No different result in that case is conceivable had the taxing officials systematically pursued the practice of collecting no tax from the competitive property. Here because of the existence of certain facts the Alabama taxing officials had declared an intent, supported by the opinion of the At-

torney General of Alabama, not to collect or attempt to collect any tax for the year in question from the shareholders of two national banks located in the same city as petitioner and directly competitive with petitioner. They had wholly failed in view of certain statutory exemptions to assess or tax other competitive property. If the exemptions were unconstitutional the competitive property should have been taxed, if constitutional the Alabama statutes in connection with the fact that exempted property in substantial amount was in actual competition with the two national banks justified the officials in their discriminatory action. But neither the statute nor the facts are justification for the inequality in treatment of petitioner's shares which resulted in a clear infringement of the Fourteenth Amendment. These shares and the shares of the two national banks were in fact and by express statutory provision giving full effect to the decisions of the Alabama Supreme Court a part of a single class or species of property for taxing purposes. Other untaxed competitive property was undoubtedly in fact a part of that same class or species.

The Supreme Court of Wisconsin in a case on all fours with the case at bar correctly interprets the *Central State Bank* decision.

> *Ashland County Bank et al. v. Village of Butternut,* 241 N. W. 638.

As in the Central State Bank case, so here "the right invoked is that to equal treatment." As there, so here, discrimination within a class, in fact and by express legislative designation constituting a single class, has resulted in clear infringement of the Fourteenth Amendment.

It is submitted that the petitioner is entitled to the relief prayed and that the decision of the Supreme Court of Alabama should be reversed.

Respectfully submitted,

WILLIAM B. WHITE,
JOHN S. COLEMAN,
Attorneys for Petitioner.

APPENDIX.

The following are the Statutes of Alabama so far as material to this case:

General Acts of Alabama of 1923, p. 152, Sec. 6.

"*Taxation of Incorporated Banks.*—Every share of any incorporated bank or banking association incorporated under the laws of this State, or any other state, or of the United States, shall be assessed for taxation in the county, and in the city or town where such bank is located at sixty per cent of its fair and reasonable market value. For the purpose of determining the value of such shares, the president or managing officer of such bank, or banking association, shall make out and return under oath to the assessor of the county in which such bank is located, and to the State Tax Commission, a list showing the total number of shares of capital of such bank, the name and address of every shareholder, as far as known, the fair and reasonable market value of such shares and the par value thereof, what sales of stock have been made during the last twelve months, with the names of the sellers and buyers thereof, and the price paid for same, the annual dividends declared upon the stock for the last three years, the value of the shares as shown by the books of the bank by the last report of the officers to the shareholders, the amount of the surplus, and the amount of the undivided profits not included in the surplus, and such president or managing officer shall at the same time in the manner required by law, return to the assessor a statement of all real estate and improvements thereon, and furniture and fixtures, owned by the bank situated in this State and liable for taxation. The value of the shares of such bank for taxation shall be fixed by the Board of Review and said Board of Review in

fixing such value shall deduct from the total of the shares the reasonable market value, of the real estate and improvements thereon, and the furniture and fixtures belonging to such bank and assessed for taxation, and sixty per cent of the residue after such deduction shall be the assessed value of such shares, and such residue divided by the whole number of shares, shall constitute the assessed value of each share for taxation. It is the intent and meaning of this section that the real estate of every bank shall be assessed against the bank as other real estate in this State is assessed to the owner thereof, and that such bank shall pay the taxes thereon, and that the shares shall be assessed for taxation against the shareholders at sixty per cent of their fair and reasonable market value, as above determined after deducting therefrom the reasonable market value of the real estate and improvements thereon, and furniture and fixtures of the bank and that the bank shall pay for the shareholders respectively the tax so assessed, against their shares. In arriving at the fair and reasonable market value of the shares, there must be considered everything which gives them value, such as franchise, capital and assets of the bank, the real and personal property, the reserve fund and surplus, the undivided profits not included in the surplus, and all other interests of the shareholders that would pass to a purchaser on a transfer of his stock, and except as herein expressly provided, no separate tax shall be levied upon these elements, of value or any of them. It shall be no ground of objection to such assessment of shares that it is entered upon the assessment book in the corporate name of the bank."

General Acts of Alabama of 1923, p. 152, Sec. 7.

"*Reports Required of Banks.*—The reports required from banks by the preceding sections shall be

made on blanks furnished by the State Tax Commission. The failure of any banks to make the report required herein for the assessment for ad valorem taxation by December 31st of the year for which the tax is to be assessed shall subject such bank to a penalty of five dollars per day for each day's delinquency, which penalty may be collected by suit in the name of the State in any court of competent jurisdiction in Montgomery county, Alabama."

General Acts of Alabama of 1923, p. 152, Sec. 5.

"*Taxation of Unincorporated Banks.*—Any unincorporated bank, private bank or institution doing a banking business that is not incorporated shall be assessed at sixty per cent of its fair and reasonable market value. For the purpose of aiding in determining the amount of such assessment, the owner, president, cashier or manager of such bank shall under oath file with the tax assessor a statement in duplicate, one of which shall be forwarded to the State Tax Commission at Montgomery, Alabama, showing the capital of such bank, its surplus, undivided profits not included in the surplus, and all real estate owned by said bank and situated in this State, with a description of the same and the value of such real estate and the name of the person or the names of the persons who own said bank, what interest or interests in said bank have been sold during the past twelve months, the price of the same, the name of the seliers, and the purchasers, the annual dividends declared by such bank for the last three years and the amount of the capital, surplus and undivided profits not included in the surplus. The Board of Review or State Tax Commission may examine any person with reference to the matters mentioned in said affidavit, and from all sources of information herein provided for, and from all other information that may be ob-

tained, the Board of Review shall determine the amount of such capital, surplus, undivided profits not included in the surplus, and the value of the real estate of such bank. From the amount of the sum of the capital, surplus and undivided profits not included in the surplus so determined, the Board of Review shall deduct the value of the real estate of said bank. The bank shall pay a tax on the real estate and on the residue of all of its capital as above determined."

General Acts of Alabama of 1927, p. 139, Sec. 25.

"*Taxation of Domestic Corporations Except Banks and Building and Loan Associations.*—Every share of any domestic corporation (except banks or banking associations and building and loan associations, and mortgage companies or corporations making loans on real estate or purchasing mortgages or mortgage notes on real estate and industrial loan companies or corporations), shall be assessed and the taxes thereon collected in the county wherein such corporation has its home or chief office in the State, and shall be assessed at sixty per cent of its fair and reasonable market value to the person in whose name such shares stand on the books of the corporation and not to the corporation. The President or managing officer of every such corporation shall make out and return under oath to the tax assessor and to the State Tax Commission a list showing the total number of shares of capital stock of such corporation and the par value thereof, and the full name and residence of each stockholder, as far as known, the actual value thereof, the date of the last sale of shares of stock of such corporation, with the name of the seller and the purchaser and the price paid for the same, and the annual dividend declared on the stock of such corporation, for the last three years, and the value of the shares as shown

by the books of the corporation, and by the last report of the officers to the shareholders, and the amount of the surplus, and the amount of the undivided profits not included in the surplus, and such other information as may be required by the State Tax Commission. There shall be attached to the copy of the return made to the State Tax Commission a balance sheet showing the condition of such corporation at the close of its fiscal period next preceding October first of the year for which the assessment is to be made. Such corporations shall at the same time make a tax return sworn to by its president or manager, to the State Tax Commission and to the County Tax Assessor, on a form prescribed by the State Tax Commission, of all taxable property, real and personal, situated in the State and owned by such corporation, and the State Tax Commission after passing on the value of the shares of the capital stock, shall deduct from the total value of such shares the reasonable market value of the real and personal property of the corporation, as shown to be by such tax return of the corporation, and sixty per cent of the residue of value remaining after such deduction shall be the assessed value of the whole of such shares, and such sixty per cent of the residue divided by the whole number of shares, shall constitute the value of each share for taxation. Provided, however, that if any property owned by a corporation, which property is subject to taxation in this State, is omitted from the tax return filed by the corporation, the same shall be assessed as an escape item or items of taxation in the same manner as escaped property of individuals is assessed and the value of such omitted property shall not be deducted from the value of the shares of stock of the corporation as assessed for taxation. The corporation shall pay for the shareholders the tax assessed against his shares, and the amount so paid for any shareholder

shall be a lien on any interest which such shareholder may have in any property owned by the corporation. In arriving at the value of the shares of the stock of a corporation organized under the laws of Alabama for the purpose of conducting an insurance business, there shall be deducted from the value of such shares, in addition to the assessed value of its property, (the amount of its bonds of the State of Alabama, or bonds of any county or municipality thereof, and of the United States), held by such insurance corporation at the time of such assessment, which said bonds were held during all the six months preceding such assessment. If the aggregate value of shares does not exceed the aggregate value of the real and personal property of the corporation as returned for taxation, then no tax shall be demanded or collected on the shares, and no other deduction shall be made from the aggregate amount or sum at which the real and personal property of the corporation is returned for taxation than is herein specifically provided for. Provided that any corporation within the provisions of this section shall be entitled, for the purpose of arriving at the value of shares for taxation, to have deducted from the value of its shares, as fixed by the State Tax Commission, the assessed value of property owned by such corporation in other states or in other counties of this State on the next preceding first of October. The State Tax Commission and the tax assessor shall have a right to demand and receive of said corporation a certified copy of the assessment of any property outside of the State of Alabama sought to be deducted as above provided. The State Tax Commission shall deliver said assessment to the tax assessor with its other assessments of property in the county and notice of such assessment shall be given as in other cases. It shall be no ground for objection to such assessment of shares that the same is entered

upon the assessment books in the name of the corporation. Provided that no shareholder of any corporation which pays a tax on its franchise or intangible property shall be liable for the taxes specified in this section as to the same property. Provided, however, that the provisions of this Act, shall not apply to the shares of stock of domestic or foreign mortgage companies or corporations whose chief business is making loans on real estate, or purchasing mortgages and mortgage notes on real estate; nor shall this Act apply to the shares of domestic or foreign industrial loan companies or corporations, it being hereby expressly enacted that all shares of stock of such domestic and foreign mortgage companies or corporations and domestic and foreign industrial loan companies or corporations, shall be exempted from assessment and the payment of ad valorem taxes."

General Acts of Alabama of 1923, p. 152, Sec. 9.

"*Reports required on blanks furnished by State Tax Commission; penalty for failure to report.*—The reports required from corporations by the preceding sections shall be made on blanks furnished by the State Tax Commission. The failure of corporations to make reports required herein for the assessment for ad valorem taxation, by December 31st of the year for which the tax is to be assessed shall subject such corporation to a penalty of five dollars per day for each day's delinquency, which penalty may be collected by suit in the name of the State in any court of competent jurisdiction in Montgomery County, Alabama."

General Acts of Alabama of 1919, p. 282, Sec. 13.

"*State Tax Commission to furnish blanks; how paid for.*—That all blanks covering the assessment of

corporations shall be furnished by the State Tax Commission, the payment for such blanks to be paid out of the general appropriation for public printing."

General Acts of Alabama of 1919, p. 282, Sec. 14.

"*List of shareholders not required if corporation agrees to pay tax for such shareholders.*—If a corporation or a bank by endorsement on its tax assessment or otherwise in writing, shall agree to pay the taxes, if any, assessed on the shares for the shareholders, it need not file a list of such shareholders."

Section 3022 of the Code of Alabama of 1923.

"*Property and persons exempt.*—The following property and persons shall be exempt from ad valorem taxation and none other: (1) * * * all mortgages, together with the notes, debts, and credits secured thereby on real and personal property situated in this State, which mortgages have been filed for record and the privilege tax paid thereon; all money on deposit in any bank or banking institution in this State and all other solvent credits; * * *"